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In The
Supreme Court of the United States
October Term, 1993

NORMAN W. SWANSON, *et al.*,
Class A Petitioners, and

CHARLES L. BERRY, *et al.*,
Class B Petitioners,

v.

THE STATE OF NORTH CAROLINA, *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the
Supreme Court of North Carolina

PETITIONERS' REPLY BRIEF

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PETITIONERS' REPLY BRIEF

Respondents do not contest that Petitioners raise issues of substantial public importance.[1] The decision below affects over 143,000 federal retirees and employees in North Carolina alone, more than 10,267 of whom have died in the five years since *Davis*. (App. S). The extent to which this Court will accommodate state

[1]Twenty-four Attorney Generals, as *Amicus Curiae* in *Reich v. Collins*, agree that review there will not answer the remedial relief questions raised here. *See Amicus* Brief filed in Support of Respondents in *Reich v. Collins*, No. 93-908, at 28: "Even if the Court concludes [in *Reich*] that Georgia's pre-deprivation process is inadequate to satisfy federal due process, whether either federal law or state law mandates remedial relief in [*Reich*], and what form any remedial relief might take are issues for another day. Those issues are not presented in [*Reich*] and will not be resolved by the decision [there]." *See* Petition ("Pet."), pp. 3, 11.

taxation interests which collide with federal due process principles is squarely presented. The decision below also conflicts with decisions of other state courts of last resort[2] as well as *McKesson v. Div. of Alcoholic Beverages and Tobacco*, 496 U.S. 18 (1990), *Harper v. Virginia Dept. of Taxation*, 113 S. Ct. 2510 (1993), *Mathews v. Eldridge*, 424 U.S. 319 (1976), *Brinkerhoff-Faris Trust & Sav. Co. v. Hill*, 281 U.S. 673 (1930), and *Felder v. Casey*, 487 U.S. 131 (1988).

This case presents many unaddressed issues about specific aspects of the post-deprivation relief required by due process, including: (1) when a state provides *no* pre-deprivation remedy, can it collect a tax under duress and then deny, for no purpose, all opportunity to challenge the tax for at least ninety days; (2) did Respondents' application of Section 267 to Petitioners, including all of the Department's misstatements and confusion, deprive Petitioners of a meaningful opportunity to pursue North Carolina's onerous refund remedy; (3) can a state tell taxpayers they have three years to seek refunds and then limit them to thirty days[3]; (4)

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[2]Compare *Swanson III* with *Strelecki v. Oklahoma Tax Comm'n*, 872 P.2d 910 (Okla. 1993), *on reh'g*, 1994 WL 102224 (Okla. 1994); *Hagge v. Iowa Dept. of Revenue and Finance*, 504 N.W.2d 448 (Iowa 1993); *Brumley v. Utah State Tax Comm'n*, 868 P.2d 796 (Utah 1993, amended January 13, 1994); *Marx v. Broom*, 632 So.2d 1315 (Miss. 1994); *Hackman v. Dir. of Revenue*, 771 S.W.2d 77 (Mo. 1989 (en banc)), *cert. denied*, 493 U.S. 1019 (1990); *Kuhn v. Colorado*, 817 P.2d 101 (Colo. 1991), *cert. dismissed*, 112 S. Ct. 1925 (1992); *Cambridge State Bank v. James*, 514 N.W.2d 565 (Minn. 1994); *In re Hawaiian Flour Mills, Inc.*, 868 P.2d 419 (Hawaii 1994); *Nevada v. Scotsman Mfg. Co.*, 849 P.2d 317 (Nev. 1993); *Service Oil v. North Dakota*, 479 N.W.2d 815 (N.D. 1992).

[3]Respondents' reliance on *Swanson v. Powers*, 937 F.2d 965 (4th Cir. 1991), *cert. denied*, 112 S. Ct. 871 (1992), is misplaced. First, *Powers* is inapposite because it only addressed qualified immunity and not the merits of Petitioners' due process claims. Second, the Fourth Circuit's statements, in *dicta*, about the tax bulletins are incomplete: while the bulletins stated they "do not cover all phases of the law," nowhere did they state that they were *wrong*. Also, the court did not address the misleading statements contained in the instructions sent to every taxpayer with no such limiting language, and the erroneous advice given directly by Department officials to Petitioners. *See* Pet., pp. 4-5.

can a state procedurally bar refund proceedings under the guise of "fiscal planning" and then do no such planning; (5) can a state reject a class demand using unannounced form and content requirements; (6) can a state, after a timely-filed class demand, block a class action by judicially requiring individual demands when the time for making the demands has expired; and (7) can a state avoid retroactive application of *Davis* by requiring, within thirty days after payment, futile refund demands for tax years before *Davis*?

Since twenty two of the twenty three states affected by *Davis* have either settled or are settling, this case may provide the last opportunity to convert the *Davis* aftermath into definitive guidance on the constitutional parameters for post-deprivation relief mandated by *Harper* and *McKesson*.[4] With all of the resources invested in struggling with *Davis*, guidance is critical to avoid wasteful repeat of this struggle. Further, absent review, North Carolina may become the only state in the union whose retirees receive neither meaningful relief for admittedly unconstitutional taxation nor considered answers to the serious questions raised about their treatment both before and after *Davis*.

With no pre-deprivation remedy and a mere thirty-day demand window, North Carolina has the most restrictive refund scheme in the nation. Given the concerns with pre-deprivation relief expressed by Attorney Generals for twenty-four states (fn. 1, *supra*), approval of North Carolina's scheme, particularly as applied to Petitioners, will almost certainly make it the model, sound the death knell for pre-deprivation remedies, and relegate taxpayers to the variable and potentially arbitrary generosity of state legislatures to obtain refunds of illegally-collected taxes. *McKesson* squarely rejects the idea that meaningful relief for unconstitutional taxation is a matter of state legislative and judicial grace; such relief is a constitutionally protected right.

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[4]Amended Appendix CC updates the status of *Davis*-related litigation.

In contrast to these substantial issues, Respondents oppose the instant petition by claiming that their actions were "clearly lawful," and, therefore, this Court need not intervene. Yet, the majority opinion below ignores Petitioners' questions about what happened to them, dismisses without discussion the dissent's serious constitutional objections, and provides little or no illumination for the future. Justice and the public deserve better. Review should, therefore, be granted regardless of the merits of Respondents' claim that their actions were lawful.[5]

1. Respondents' reliance on *McKesson* is misplaced. This Court, in *McKesson*, reaffirmed that "[t]o satisfy the requirements of the Due Process Clause . . . in [a] refund action the State must provide taxpayers with, *not only a fair opportunity to challenge . . . the legal validity of their tax obligation*, but also a `clear and certain remedy,' . . . to ensure that the opportunity to contest the tax is a meaningful one." 110 S. Ct. at 2251 (emphasis added). In noting that "[t]he fundamental requirement of due process is the opportunity to be heard `at a meaningful time and in a meaningful manner'" *McKesson* did not alter, but rather reinforced, this fundamental tenet of due process. *Id.* at 2251 n.22 (citing *Mathews v. Eldridge*, 424 U.S. 319, 333 (1976)).

North Carolina's absence of a pre-deprivation remedy coupled with Section 267's futile demand and wait requirement unnecessarily postpones a taxpayer's opportunity to be heard at a meaningful time and in a meaningful manner. The result: taxpayer challenges to unconstitutional and illegal taxes are chilled far beyond the extent necessary to protect state taxation interests. *See Bell v. Burson*, 402 U.S. 535, 542-43 (1971) ("The hearing required by the Due Process Clause must be `meaningful,' . . . and appropriate to the nature of the case'") (citations omitted); *Goss v. Lopez*, 419 U.S. 565, 582-83 (1975) ("[T]here are recurring

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[5]Respondents also claim that Petitioners' statement of the case is biased and misleading. Petitioners rest upon the quality and quantity of their citations to the record and Respondents' failure to identify even one factual error.

situations in which prior notice and hearing cannot be insisted upon. . . . In such cases, the . . . hearing should follow as soon as practicable"); *North Georgia Finishing, Inc. v. Di-Chem, Inc.*, 419 U.S. 601, 607 (1975) (citing absence of an early hearing following garnishment as ground for striking down garnishment statute). Further, Section 267 *as applied* ultimately deprived Petitioners the opportunity to be heard *at all*. Section 267 thus unlawfully barred Petitioners' right to a hearing in the first instance and a clear and certain remedy in the second.[6]

Respondents ignore this absence of a meaningful opportunity to be heard and confuse the issues thus presented by relying upon *dicta* from *McKesson*[7] which merely responded to Florida's claim that the financial impact of unanticipated tax refunds was sufficient to deny meaningful backward-looking relief. In rejecting Florida's claim, this Court noted that various procedural mechanisms available to states adequately allow fiscal planning if states choose

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[6]To afford a "clear and certain" remedy, Respondents must refund the tax, tax the state retirees retroactively, or provide some combination which creates, in hindsight, a non-discriminatory scheme. *Harper*, 113 S. Ct. at 2519-20.

[7]"The State might, for example, provide by statute that refunds will be available only to those taxpayers paying under protest or providing some timely notice of complaint . . . [or] enforce relatively short statutes of limitations applicable to such action." *McKesson*, 496 U.S. at 45. The "protest requirements," "timely notice provisions" and "short statutes of limitation" mentioned by Justice Brennan should be viewed in light of his earlier opinion in *Felder v. Casey*, 487 U.S. 131, 153 (1988). What a state *can* do is require a taxpayer to protest at the time a tax is paid to enable fiscal planning by the state. What a state *can* do is enforce "relatively short" statutes of limitation. What a state *cannot* do, and what North Carolina has done, is condition the right to recovery "upon compliance with a rule designed to minimize governmental liability, and . . . [direct] injured persons to seek redress in the first instance from the very [individuals or entities who violated the victims' constitutional rights]." *Id.* What North Carolina *cannot* do is impose such onerous procedural requirements without providing an adequate post-deprivation hearing.

to use them.[8] The Court did not hold that states could use such procedural mechanisms to needlessly delay the opportunity to be heard, use such requirements for no purpose or for purposes other than fiscal planning, mislead taxpayers about the existence of such provisions, or discourage refund claims by delaying a meaningful hearing through futile procedural hurdles.

To the contrary, the watch words of *McKesson* are "meaningful time," "meaningful manner," "fair opportunity," "clear and certain," "backward-looking *relief*," "non-discriminatory scheme" and "preventing any permanent unlawful deprivation." North Carolina's scheme, as interpreted, hardly survives these standards. *McKesson*, therefore, provides Respondents no refuge. Respondents' misleading and confused application of Section 267 compounded the problem by turning Section 267 into a "trap" which deprived Petitioners of both meaningful relief and a meaningful hearing. As a result and contrary to the holding in *McKesson*, due process was trampled.

2. North Carolina's refund of a fraction of the taxes wrongfully collected after *Davis* and a subsequent tax credit do not demonstrate that Section 267 is a meaningful remedy. Respondents dispute that Section 267 is futile because a few (less than ten percent) of the affected taxpayers received refunds of 1988 tax year payments. (Br. in Opp., p.6). Yet, the North Carolina Supreme Court has unequivocally held that "questions of constitutionality are for the courts." *Coca-Cola*, 238 S.E.2d at 783.

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[8]Respondents principally contend that Section 267 is a "statute of limitation" or a "protest requirement" approved by *McKesson*. It is neither. A statute of limitation extinguishes the right to bring suit after a defined period of time. *Black's Law Dictionary*, p. 927 (6th ed. 1990). Section 267 does not extinguish any right to bring suit. No right exists until after a refund demand and a futile wait. Likewise, the demand requirement of Section 267 is not a "protest" requirement. Section 267 had a protest requirement until 1957, when the legislature eliminated it and enacted N.C. Gen. Stat. § 105-266.1 ("Section 266.1") as an alternative remedy. *See* 1957 N.C. Sess. Laws, Section 10, Chapter 1340 (App. HH, pp. 303-305). *See also Kirkpatrick v. Currie*, 108 S.E.2d 209 (N.C. 1959); *cf. Coca-Cola v. Coble*, 238 S.E.2d 780 (N.C. 1977).

Likewise, the North Carolina Attorney General has concluded that *none* of the North Carolina statutes which empower the Secretary to give refunds authorize refund of "unlawful" taxes. (App. O). Furthermore, the evidence is uncontroverted that before *Davis* any demand for refund by Petitioners or any one of them would have been denied. (Pet., p. 6 n.8, p. 19 n.32). Therefore, in context, Respondents are arguing that Section 267's demand requirement was not futile because the Secretary made refunds to a few members of Class A, but no members of Class B, even though North Carolina law provided no basis for her to do so.

This decision by the Secretary to benefit a few taxpayers by ignoring the limits upon her authority does not demonstrate that the demand requirement of Section 267 was anything other than futile and *certainly* does not demonstrate that Section 267 provides a "clear and certain" remedy or a meaningful opportunity to be heard "as soon as practicable." To the contrary, such an isolated and largely arbitrary decision to benefit a few, while the remainder are provided no relief, is the antithesis of the even-handed treatment which lies at the heart of this nation's steadfast commitment to due process for all.

Accordingly, Respondents' claims should be recognized for what they are: not only a desperate attempt to justify the inadequate relief provided to Class A Petitioners for tax year 1988, but also utterly unresponsive to Petitioners' showing that neither meaningful opportunity to be heard nor "clear and certain" relief was available to Class A for tax years 1985 through 1987 and Class B for tax years 1986 through 1989.[9] In any event, the majority opinion below's failure to even discuss this issue further supports review here.

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[9]Furthermore, the tax credit was limited to 1988 taxes Respondents knew were illegal when collected in April of 1989 (App. O), did not benefit any member of Class B, provided no relief to taxpayers who were not in a position to use the credit, and included no interest. App. HH, p. 300.

3. Class B Petitioners suffered unlawful discrimination violating 4 U.S.C. § 111 and intergovernmental tax immunity. Since no member of Class B received refunds following *Davis*, Respondents seek to fill this gap in their case by claiming the taxation of Class B did not violate 4 U.S.C. § 111 ("Section 111"). From 1979 through 1989, North Carolina provided a $1,500 income tax exemption for National Guard pay. N.C. Gen. Stat. § 105-134.6(b)(4). No equivalent exemption was provided to Class B Petitioners. Taxes were imposed and collected from Petitioners even after *Davis*. On July 20, 1990, the state legislature enacted "*An Act to Conform the Laws of North Carolina to the Requirements of Certain Federal Laws and Constitutional Principles*," repealing the discriminatory legislation. (App. HH, p. 306). Although the legislature recognized the violation of federal law, the North Carolina Attorney General now contends that the statute did *not* offend that law.

Relying solely upon the language of Section 111 and disregarding the constitutional doctrine of intergovernmental tax immunity, Respondents claim that because state guardsmen were compensated by both the state and federal governments, there was no discrimination on a "source of compensation" basis. Respondents do not, and cannot, argue that the sources of compensation of Class B Petitioners and state guardsmen are *identical*; state guardsmen, unlike their federal counterparts, are compensated from the state treasury.[10] This difference, no matter how small, in the source of pay is enough to classify National Guardsmen as *state* rather than *federal* employees -- *the only* "difference" resulting in discriminatory taxation. *See Perpich v. Dept. of Defense*, 496 U.S. 334, 345 (1990) ("unless and until ordered to active duty in the Army [in the case of a national

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[10]North Carolina provides compensation to guardsmen in the form of pay (N.C. Gen. Stat. §§ 127A-105-109); disability income (N.C. Gen. Stat. § 127A-108); pensions (N.C. Gen. Stat. § 127A-40); decorations and awards (N.C. Gen. Stat. §§ 127A-42-44); and tuition assistance (N.C. Gen. Stat. §§ 127A-192-194).

emergency], they [National Guard personnel] retained their status as members of a separate state Guard unit").

This Court has expressly held that Section 111 may not be construed without reference to the intergovernmental tax immunity doctrine. *Davis*, 489 U.S. at 816; *see also Barker v. Kansas*, 112 S. Ct. 1619, 1622 (1992). The dispositive inquiry is "*whether the inconsistent tax treatment is directly related to, and justified by, 'significant differences between the two classes.'*" *Barker*, 112 S. Ct. at 1622 (citing *Davis*, 489 U.S. at 816) (emphasis added).

Respondents only point to two alleged "significant differences" to "justify" the Class B discrimination. First, even though state guardsmen are paid from the state treasury when they perform state services (App. HH, pp. 291-293), Respondents claim the tax exemption compensated them for being available and for the services. Next, Respondents argue the tax exemption was an incentive to recruit and retain qualified members. Both are claims that the state should be allowed to use a tax exemption as additional compensation to persons providing services to the state or being recruited by the state. In *Davis*, this Court expressly rejected Michigan's similar argument, stating "[t]he State's interest in adopting the discriminatory tax, no matter how substantial, is simply irrelevant to an inquiry into the nature of the two classes receiving inconsistent treatment." 489 U.S. at 816.

Respondents have not demonstrated "significant differences" between Class B Petitioners and state guardsmen. Therefore, this clear discrimination was unlawful.[11] Review will provide this Court an opportunity to put this issue to rest.

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[11]Respondents raised other issues not worthy of discussion here, but which also lack merit. For example, Respondents submitted a supplemental brief blurring the distinction between a final *judgment on the merits* and a *final order* entitled to preclusive effect under federal law. Also, Respondents improperly focus on whether the federal court properly gave preclusive effect to *Swanson III* (an issue Petitioners are appealing in the federal case). In contrast, the issue here is the preclusive effect of the earlier federal order. (Pet., pp. 22-25).

CONCLUSION

Since this Petition was filed, every state *except* North Carolina has now provided or is attempting to provide relief in the *Davis*-related litigation. Absent review by this Court, North Carolina may be the only state to violate *Davis* and *Harper* with impunity. Resolution by this Court of the issues presented is necessary not only to ensure that Petitioners are afforded due relief equal to that granted similarly situated citizens in twenty-two other states, but also to create future incentive for states to enact constitutionally sound tax laws, to prevent post-deprivation remedy issues from repeatedly arising, and to once again establish that states may not use procedural gamesmanship to subvert the Supremacy Clause. For the reasons contained in the Petition and herein, Petitioners respectfully request that a writ of *certiorari* issue to the Supreme Court of North Carolina.

This the 19th day of August, 1994.

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